No. 22,148

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Appellee.

Appeal from the United States District Court for the Northern District of California

APPELLANT'S REPLY BRIEF

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I. THE SUPREME COURT'S MANDATE ALLOWED PETITIONER SIMPSON TO OBTAIN A JUDGMENT FOR DAMAGES AGAINST UNION OIL COMPANY WITHOUT REGARD TO THE QUESTION OF PROSPECTIVITY.

A. A supplier's coercion of a dealer's retail price had been declared unlawful before Simpson, regardless of the coercive device used.

The contentions of the appellee and the ruling of the trial court below are premised upon an unsupportable contention that the Supreme Court announced a new rule in its holding in *Simpson v. Union Oil Co. of California,* 377 U.S. 13. At no time did the Supreme Court indicate that its holding constituted a new rule. The Supreme Court's opinion in *Simpson* involves the following rulings:

1. The reiteration of the law that the coercive fixing of retail prices is unlawful regardless of what the coercive device is, *United States v. Parke-Davis & Co.,* 362 U.S. 29 (1960), explaining *United States v. Colgate & Co.,* 250 U.S. 300 (1919). 377 U.S. at 17.

2. The Sherman Act does not tolerate agreements requiring the maintenance of resale prices, whether in the form of consignment or otherwise. Id. at 24.

3. A major oil company which has lease arrangements with thousands of independent dealers may not impose non-competitive prices on these thousands of persons who might otherwise be competitive.

4. By reason of the lease and consignment agreement, dealers are coercively laced into an arrangement under which Union is able to impose non-competitive prices on thousands of dealers who otherwise might be competitive. Id. at 21.

5. Addressing itself to the defense of the Union Oil Company that the *General Electric* case sustained the validity of the Retail Dealers' Consignment Agreement Program, the Supreme Court held that the case involved patents, which, under constitutional and congressional authority, permit a manufacturer to license the patented article upon terms which in substance or effect allow it a royalty payment. The *General Electric* case did not involve distribution of unpatented articles.

The mandate of the Supreme Court was therefore as follows:

1. Union Oil Company violated the antitrust laws, for there was an agreement for resale price maintenance, coercively employed.

2. Simpson suffered actionable wrong or damage.

3. Simpson's case was remanded for trial on all other issues in the case and the damages, if any, suffered.

4. Whether or not the *Simpson* rule as applied to non-coercive price fixing which utilized a bona fide consignment agreement was to be applied prospectively was reserved. As to this ruling, appellant contends that the Supreme Court most certainly did not authorize a show-

ing of equities warranting prospective application of this extension to Union Oil or to those who have used coercion in maintaining resale prices.

The antitrust laws have long declared unlawful the use of coercion to control an independent dealer's retail prices. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922). General Electric did not involve facts showing the coercive employment of agency price-fixing agreements. *Beech-Nut,* supra, *General Motors,*[1] *American Tobacco,*[2] *Richfield*[3] and *Parke-Davis,*[4] however, made it crystal clear that suppliers had no dispensation under the Sherman Act to compel obedience to price orders on fear of destruction of a dealer's entire business. Further, it has long been held that a supplier could not threaten a dealer with loss of supplies or his business unless he conformed to supplier's demands or retail prices. Liability under the antitrust laws follows the cancellation or loss of supplies if the dealer did not accede to the threats. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951); *Emich Motors v. General Motors Corp.,* 340 U.S. 558 (1951). Further, the Supreme Court has reiterated in *Perma-Life Mufflers, Inc. v. International Parts Corp.,* 5 Trade Reg. Rep. ¶ 72,486 (June 10, 1968), that threats from suppliers stemming from the dealers' complaint against the restrictive policies of the suppliers was evidence of a coercive program. Id. at 85,590.

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[1]*United States v. General Motors Corp.,* 121 F.2d 376 (7th Cir. 1941).

[2]*American Tobacco Co. v. United States,* 147 F.2d 93 at 113 (6th Cir. 1944), *aff'd* 328 U.S. 781 (1946).

[3]*United States v. Richfield Oil Corp.,* 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd* 343 U.S. 922 (1952).

[4]*United States v. Parke-Davis & Co.,* 362 U.S. 29 (1960).

B. Appellant's constitutional objections are not frivolous.[5]

Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), did not raise the contention of this appeal that, because of Simpson's federal rights guaranteed by the Sherman and Clayton Acts, the federal judiciary is without power to refuse to give Simpson his federal remedy under the doctrine of prospectivity. The *Sunburst* case rather involved the ability of a state court under the Fourteenth Amendment to determine whether or not its decisions would be prospective. As was pointed out in Appellant's Opening Brief, *Linkletter v. Walker,* 381 U.S. 618 (1965), involved federal judicial policy in the criminal law field. *Linkletter* did not involve the denial of a federal statutory remedy. (*Hanover Shoe v. United Shoe Mach. Corp.,* 5 TRADE REG. REP. ¶ 72,490 (June 17, 1968), however, is now more instructive in Sherman Act litigation than *Linkletter. Hanover Shoe* is discussed by appellant at section C, 2 p. 7, infra.)

The constitutional issue involved in this appeal is whether or not, under the doctrine of separation of powers and the Fifth and Seventh Amendments, the federal courts have power to deprive a litigant of his remedy under federal statute. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1929).

Appellee's discussion of retroactivity under heading I, B deals there with the broader issue of whether or not there is any constitutional objection to a Court's decision to apply a reversal prospectively when the party is not seeking enforcement of a federal remedial statute. Even in that field, it is the general rule that overruling deci-

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[5]Appellee claims appellant has waived his constitutional arguments. But appellant is not urging the unconstitutionality of a statute as was the case in *Williamson v. Weyerhaeuser Timber Co.,* 221 F.2d 5 (9th Cir. 1955). The federal appellate courts will hear arguments concerning the deprivation of federal rights even though raised for the first time on appeal. *United Bhd. of Carpenters v. United States,* 330 U.S. 395, 411 n. 24, 412 n. 25 (1947).

sions will always be retroactively applied in matters involving general mercantile law. 14 Am. Jur. *Courts* § 130 (1938). The exception to the general rule of retroactivity applies only to contract cases or cases involving vested property interests. *Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175 (1863).

Appellee states that "It is obvious that what induced the Supreme Court to bring up the *Simpson* case for its attention was not any concern whether a particular man named Simpson should recover damages from a particular company named Union Oil, but a desire to rule on consignment merchandising in the economy of the United States." (Brief for Appellee at 24.) That sentence is contradicted by the universal rule that the Supreme Court does not decide questions which do not involve cases or controversies between parties. *Trail-Mobil Co. v. Whirls,* 331 U.S. 40 (1947); *United Pub. Workers v. Mitchell,* 330 U.S. 75 (1947); *St. Pierre v. United States,* 319 U.S. 41 (1943). Simpson's right to recover against Union Oil is a matter of federal legislative prerogative and the courts are without authority to interfere with the legislative scheme.

A constitutional right to jury trial is involved in the trial court's determination to refuse to enforce the jury verdict.

The ability of a federal court in a jury trial to determine issues of fact is also involved in this appeal. Appellee claims that appellant has waived the jury trial argument. Appellant, however, all through the pretrial stages, urged that the *Simpson* decision precluded any equity determination, whether by court or by jury. At the pretrial conferences, after an adverse decision on that contention, plaintiff's counsel urged that Simpson's right to recovery of damages should be separated from the equity defense (Tr. 117-119). It was the position of plaintiff's counsel that the jury should determine the damages, if any,

suffered, and that the matter of the "equities" be, at the most, simply a matter of opening the record to the defendant for the Supreme Court's consideration. The court ruled against plaintiff. It did not view the equity defense as a matter of completion of the record, but as grounds for dismissing plaintiff's complaint. This was opposed by appellant. Thus, there is a fundamental issue here; whether or not the federal judicial system contemplates a federal court, based upon its findings of fact, to dismiss a jury verdict. Appellant urges that the Seventh Amendment prevents such action. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

C. Union Oil cannot validly argue that there would be any unfairness to it by enforcing the judgment below.

1. Introduction.

The premise of Union Oil Company that it is unfair to apply a rule dated April 20, 1964, to facts arising in 1956 to 1958 is preposterous, since the decision applied to the facts which plaintiff below put into issue, and which Union Oil contested. Union Oil asserted the validity of its Retail Dealer Consignment Agreement Program to Mr. Simpson. It determined to oust Mr. Simpson from the service station pending the appeal, despite the long line of cases authorizing treble damages by ousted or cancelled dealers. See cases cited supra, at p. 3. Mr. Simpson was obviously to be a conspicuous example to errant dealers. Had Union Oil not been so lawless and punitive, it could have allowed Mr. Simpson to stay on the premises pending the appeal. It instead adopted a bold, ruthless and predatory method of disposing of Mr. Simpson, which raised a claim of the violation of his federal rights. Having adopted such a course of conduct, there can be no argument of fairness. Union Oil cites the damage figures found by the jury in terms of its investment powers, attempting to persuade the Court that it has been unfairly adjudged. What it ignores, of course, is that Union pro-

mulgated an *unlawful* program and enforced it during the period 1955 through 1964. This control of retail prices was made at the expense of Mr. Simpson and all dealers who were the victims of this unlawful program, as well as the general public. There is the encouraging of lawlessness in not requiring Union Oil to disgorge these illegal fruits to those it has injured and attempted to ruin. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, supra. It is a matter of Congressional will.

2. Union's recitation of the important factors determining whether a new rule should be applied prospectively is deficient under Hanover Shoe.

The factors set forth by Union Oil which relate to the general doctrine of prospectivity have been shown by the Supreme Court to be incomplete. Union Oil asserts that the determining factors are (a) reliance on the General Electric doctrine, and (b) the purpose sought to be served by replacing the old rule by a new one.

In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 5 TRADE REG. REP. ¶ 72,490 (June 17, 1968), the Supreme Court held that the appellate court erred in applying prospectively prior antitrust decisions in the favor of the defendant there. In this case the Third Circuit had ruled that the *Alcoa-American Tobacco* rule[6] represented a new departure in antitrust laws under which the plaintiff need not prove the actual exclusion of competition in order to show a violation of Section 2 of the Sherman Act. Based upon that interpretation of the Rule, the Third Circuit adopted the argument of defense counsel and disallowed damages to Hanover Shoe based upon United Shoe's violation of Section 2 prior to 1946. It was reversed by the Supreme Court.

The Supreme Court did not pass upon the question of whether or not there could ever be prospective application

[6]*American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

of its overruling decision, since it held that the Court of Appeals incorrectly interpreted the *American Tobacco* opinion as being novel and innovative. In its analysis of the issue the Supreme Court stated that the defense to liability under the Sherman Act because of reliance upon prior law could not even be raised unless (1) there was a clearly declared judicial doctrine, (2) upon which a defendant relied and (3) under which its conduct was lawful, (4) a doctrine which was overruled (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Id. at 85,622. Appellant asserts that under the tests laid down in *Hanover Shoe,* Union Oil can fare no better than did United Shoe.

The plain fact of the matter is that Union is attempting to avoid the fact that its retail dealer consignment agreement program was coercive. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441 (1922). It is relying, therefore, only upon the slender reed that *General Electric* allowed the distribution of patented articles pursuant to agency agreements which contained price-fixing clauses. There has never been (and there can never be under the history and purposes of the Sherman Act) clearly declared judicial doctrine which allows agency agreements to be used coercively, or which sanctions a scheme or program by which independent dealers are threatened with lease ouster unless prices are agreed to. As heretofore shown judicial doctrine was well established prohibiting coercive devices in order to control retail prices. The *General Electric* case simply did not involve coercive conduct. The record in the *Simpson* case showed a coercive price-fixing program. Had the program not been coercive, Mr. Simpson would still have his Union Oil service station business.

Even assuming General Electric established clearly declared judicial doctrines, there could be no justifiable re-

lance upon *General Electric* because of the developments in antitrust law and because the coercive features of the program were "left to marketing". Since *General Electric,* there were six lines of development which Union Oil's counsel were bound to know:

1. Horizontal and vertical price control is illegal per se. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

2. Restraints of trade could not be cloaked by consignment or agency devises. *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346 (1922); *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). Rather the rule announced in *United States v. Masonite,* 316 U.S. 265 (1942), was that liability was to rest, not on the skill with which counsel has manipulated the concepts of "sale" or "agency," but on the significance of the business practices in terms of restraint of trade. Id. at 280.

3. *General Electric* was directly attacked by the Department of Justice and remained as precedent for patented articles by a four to four split. *United States v. Line Material Co.,* 333 U.S. 287 (1948). Its applicability as a precedent under the Sherman Act was repudiated directly in *United States v. Masonite Corp.,* 316 U.S. 265 (1942), and in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948).

4. The Supreme Court made known a clear and fixed rule that service station dealers are independent businessmen whose businesses cannot lawfully be controlled by their landlord-suppliers' coercive acts. *Standard Oil & Standard Oil Stations, Inc. v. United States,* 337 U.S. 293 1949); *United States v. Richfield Oil Co.,* supra.

5. Companies holding sufficient economic power to impose an appreciable restraint on free competition were prevented from requiring a dealer to consent to agree-

ments which adversely affect free trade and commerce. *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594 (1953).

6. Refusals to deal cannot be utilized to enforce a resale price maintenance program which uses overt threats of refusal to deal as a means of coercion. *United States v. Parke-Davis & Co.,* supra; *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944); *Federal Trade Comm. v. Beech-Nut Packing Co.,* supra; *United States v. Colgate & Co.,* 250 U.S. 300 (1919).

Union Oil was bound to have knowledge of these lines of cases. Its counsel were grossly negligent in analysis of the retail dealer consignment agreement program if they advised Union without reference to these decisions. It is noted that Union Oil presented the court below with no written analysis of the lawfulness of its retail dealer consignment agreement program by its attorneys, although such memoranda were subpoenaed. (R. 513, Jan. 27, 1967, Tr. 1149.)

There is manifestly here a case in which Union Oil Company risked a predictable decision and a result which was sought by the House Subcommittee on Small Business, the Federal Trade Commission, and the Department of Justice.[7]

The cases cited by Union Oil Company do not support the proposition that it could employ coercion to fix the independent dealers' prices. *Lyons v. Westinghouse Elec. Corp.,* 235 F. Supp. 526 (S.D.N.Y. 1964), does not involve coercive employment of an agency agreement. The com-

[7]The Department of Justice assumed the larger burden of proving that the Pacific States gasoline industry was embarked upon a conspiracy to monopolize and a conspiracy to restrain trade, part of which involved controlling retail prices of service station dealers. At no time did the Department of Justice state that Union's Retail Dealer Consignment Agreement Program was lawful. (Pl. Ex. No. 74.)

plaint in *Sun Oil Co. v. Federal Trade Comm.*, 350 F.2d 624 (7th Cir. 1965), put the oil industry on notice that the Federal Trade Commission was attacking consignment programs as coercive. *C.B.S. Business Equip. Corp. v. Underwood Corp.*, 240 F. Supp. 413 (S.D.N.Y. 1964), was a case in which the defendant claimed to hold or use patents. The decision involved a motion for summary judgment by the plaintiffs, which the court denied, noting, in part, that there were issues on the question of coercion. At 425, the Court stated:

> "There are additional issues that remain unsolved. Mr. Justice Douglas repeatedly refers to the 'coercive' type of agreement involved in Union Oil. The question of 'coercion' is contested between the parties to the Sales Agreement herein."

The cases cited by the defendant therefore support plaintiff's showing that there was no new rule involved in *Simpson* insofar as the Court centered its attention on the coercive aspects of the Retail Dealer Consignment Agreement program.

D. Simpson's own conduct was fully justified and in any event is immaterial to the issue of Union's liability to him.

Despite the fact that the Supreme Court had reversed the Ninth Circuit in ruling that Union Oil had a defense to liability based on Simpson's consent to the Consignment Agreement, defendant argued successfully below that Simpson's conduct was material to the issue of the "equities." So intent is Union Oil upon blackening the pot that it quotes Simpson's statement that he considered the Consignment Agreement "crap", a word specifically stricken by the court (Tr. 1690-1691). It is noted that the statement cited by Union shows that it knew Simpson's views as to the validity of the Consignment Agreement, yet Union charges fraud on Simpson's part. But the important consideration is that the Supreme Court has ruled that a plaintiff's moral reprehensibility is not

to be considered in private antitrust actions. The Supreme Court held that the purpose of the antitrust laws is best served by insuring that the law encourages the private plaintiff's suit, because of the overriding public policy in favor of competition.

In *Perma-Life Mufflers, Inc. v. International Parts Corp.,* supra, the Supreme Court stated, at 85,589-85,590, as follows:

> "Similarly, in *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart,* supra."

A further ruling in *Perma-Life* shows that the basic illegality here is that of Union's promulgating an illegal Retail Dealer Consignment Agreement, in coercing the dealers to use it, and in coercing the dealers to abide by its particular pricing orders. The purposes of the antitrust laws are flouted when the promulgator of such a

system is determined not liable to its victims. That issue is involved in this appeal.

E. The arguments of the appellant are not miscellaneous, and appellee uses that label because of their importance.

1. That the Supreme Court held that Union in its Retail Dealer Consignment Program employed coercive devices is decisive.

At pages 40-42 of his Opening Brief, appellant has listed the eight coercive aspects of Union Oil's Retail Dealer Consignment Program. That these factors are coercive is made plain in *Perma-Life Mufflers*. Union Oil told the dealers that it would do all in its power to compel them to follow consignment prices; that if the dealers did not follow Union Oil's prices they would not obtain a lease renewal. Union Oil even attempted to frighten the dealers into not filing suits testing the legality of its program. The Supreme Court in *Perma-Life* ruled, where evidence of the defendant's enforcement of an illegal system was present, that plaintiffs were not active participants in the illegal system.

Justice Fortas in a concurring opinion stated at 85,591 as follows:

> "But equality of position of this general nature is necessary before *in pari delicto* may apply to bar a remedy under antitrust. Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent. The owner of a gas station may enter into an arrangement with the distributor and may benefit from its restrictive provisions. But this less-than-equal participation in the crime must not bar it from recovering in its own and the public interest if it can show that it has suffered compensable harm. Our decision in *Simpson* indicates this quite clearly. The antitrust laws are intended to protect individuals 'from combinations fashioned by others and offered to [them] . . . as the only feasible method by which [they] . . . may do business.' *Ring v. Spina,* 148 F.2d 647, 653 (1945)."

So it is that Union Oil Company does not come to grips with what it did during the period 1955-1958 to the dealers in insisting on control of the dealers' prices. It cannot do so because such factors demonstrate the basic point in this appeal which is that the Supreme Court held that the coercive employment of the Retail Dealer Consignment Agreement was violative of the antitrust law, and as such, there was no novel departure from existing antitrust doctrine.

2. Union's Consignment Agreement differed from that involved in General Electric.

Union argues the relationship between its consignment agreement and that of General Electric as if this were an open matter, but the Supreme Court has ruled on this issue. It ruled that the Consignment Agreement of Union Oil somewhat parallels the agency agreement used in the *General Electric* case. Union Oil argues that it did not require the consignee to cover the "stock", the gasoline, with insurance, but the Consignment Agreement specifically provided that the consignee "will indemnify and hold consignor harmless from liability, claims, or demands for damage to property occurring in connection with the conduct of his business" and will maintain adequate insurance against such liability (R. 97). Clearly, any theft or damage to gasoline was to be the responsibility of the consignee dealer. This is clearly so because paragraph 6 of the Consignment Agreement (R. 97-98) specifically holds the consignee liable for loss or damage other than earthquake, lightning, flood, fire, or explosion, not caused by his negligence, and will pay consignor for all gasoline sold, lost or damaged, at consignor's authorized retail prices then in effect (R. 97-98).

3. The cases cited by appellant are relevant.

In *Masonite,* the Supreme Court specifically referred to the *General Electric* case and gave its interpretation of

General Electric. The Court stated, 316 U.S. at 280:

> "In the General Electric case, the Court thought that the purpose and effect of the Marketing Plan was to secure to the patentee only a reward for his invention. We cannot argue that this is true here."

Clearly, defendant is not to be allowed to limit the warnings of *Masonite*. The Supreme Court did not say that *in horizontal conspiracy cases* the result must not turn on the skill with which counsel has manipulated the concepts of sales and agency agreements, but on the significance of the business practices in terms of restraint of trade. The Supreme Court stated, that *so far as the Sherman Act is concerned,* the result must not turn on such skill (316 U.S. at 280). Union's attorneys knew that the Sherman Act covered vertical restraint as well as horizontal restraint and that *Masonite* therefore was to be the guide in both horizontal and vertical price control programs under the Sherman Act.

Union takes issue with this Court's description of the Sun Oil litigation in *Simpson v. Union Oil Co.,* 311 F.2d 764, 769 n.6 (9th Cir. 1963). The Sun Oil complaint was filed November 8, 1957, five months before Simpson was ousted from his station. Thus, Union Oil Company was put on notice that coercive use of consignment agreements was subject to governmental attack under the Sherman Act, or under Section 5 of the Federal Trade Commission Act. The Federal Trade Commission complaints cited by this Court in *Simpson* show that the oil industry was on notice that governmental antitrust agencies were following the request of the House Subcommittee on Small Business to proceed against consignment agreements. Union Oil chose not to accede to the requests of the Subcommittee, but to contest the issues in court at Simpson's expense. It is in no position to complain of its liability to Simpson, having lost the issue.

4. The Interim Report of the House Small Business Committee was involved with Consignment Programs.

Union Oil claims that the report of this Committee of August 14, 1957 pertains or relates only to conspiracy charges. Such contention is unmeritorious. The House Subcommittee was manifestly urging investigation of consignment agreements, their use to control the dealers' prices and narrow their margin of profit. *Simpson v. Union Oil Co.,* supra, 377 U.S. at 19, n.5; see Pl. Ex. No. 80. Union Oil further contends in that section of its Brief that the Court in *United States v. Standard Oil Co.,* 1958 TRADE CAS. ¶ 69,212 (1958), was fully informed as to Union's Retail Consignment Agreement Program; but Union Oil had taken the position, as is shown in Appellant's Opening Brief, not to disclose the mandatory nature of its price control programs. Justice Carter's description, in *United States v. Standard Oil Co.,* indicates that he was not informed that Union's Marketing policy was to oust errant dealers. Id. at 74,760. The statement of Judge Carter that, "We can assume that they would be free to operate on a buy or sell basis" indicates that the program was urged by Union as not being mandatory. *Simpson* proved otherwise.

Union Oil cites the statements of Mr. Greg Potvin in 26 A.B.A. ANTITRUST SECTION at 105 (1964). Union Oil does not cite Mr. Potvin's reference to the letter from Honorable William H. Orrick, Jr., Associate Attorney General in charge of the Antitrust Division to Chairman Roosevelt, stating in pertinent part,

> "We do not consider that the exception made in the decree with regard to consignment selling in any way immunizes the defendants bound by the judgment from an attack under the antitrust laws if a violation results from their engaging in consignment selling." Id. at 105-106.

Mr. Potvin further stated in 1964 that, "It does not presently appear that there is widespread conformance with the dictates of the *Simpson* case." Id. at 106.

II. DEFENDANT'S MOTION FOR A NEW TRIAL WAS IMPROPERLY GRANTED.

Appellee's arguments advanced here are in direct conflict with the Mandate of the Supreme Court in *Simpson*. They are in essence the arguments made to and adopted by the Honorable Lloyd H. Burke in the District Court's Memorandum and Order of December 30, 1960 (R. 358-359). The Supreme Court opinion held that Simpson suffered actionable damage and ordered a trial on this issue. The very law of the case precludes Union Oil Co. from reopening the matter.

Defendant's discussion of the facts further ignores entirely the case of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964). At 464, this Court stated,

> "Cancellation of Lessig's lease and contract in such circumstances would be unlawful, though in exercise of a right expressly granted Tidewater by the lease and contract. Lessig could claim compensation for the resulting loss, including reasonable anticipated future profits, and there was sufficient evidence from which the jury could find that such loss occurred."

Union argues that Simpson made no profits as a matter of law. This was a matter contained in Judge Burke's opinion appealed to the Supreme Court and closed by its mandate. It argues that Professor Paglin did not testify as to the value of appellant's business. The same basic contention (by the same counsel) was made in *Lessig* and was rejected. The exhibits prepared by Professor Paglin here specifically refer to the value of Simpson's Ventura Avenue Service Station. Pl. Ex. at 68A-D. It is clear that Dr. Paglin was offering a statistical analysis of what net profits would result at the service station business, based on the actual performance during the period of Simpson's occupancy, along with other factors (Tr. 758).

That a dealer spends many hours to build a clientele, and that Simpson's clientele were impressed by his busi-

ness ability, is seen by the evidence that 230 customers supported Simpson's staying at the service station (Pl. Ex. No. 48, Tr. 43). The purpose of damage law is to make the person as whole as he would be but for the proven violation. Here the defendant destroyed the plaintiff's business, and cannot be heard to argue that Simpson was not damaged at all by leaving the Union station. A Union Oil dealer can expect to obtain continued renewal of his leases as long as he abides by Union's policies (R. 441, 450-452). A person's right to a business generating income of over $10,000 a year cannot be so lightly treated. Union Oil destroyed Simpson's business and immutably altered the future course of his economic activities. That Union Oil dealers averaged 6¢ a gallon or more margin (after rent) before the consignment program was established by the testimony of Mr. Simpson (Tr. 644).

III. THE JUROR AFFIDAVITS SHOULD BE STRICKEN AND THEY PLAYED AN IMPROPER ROLE IN THE COURT'S GRANTING A NEW TRIAL.

Appendix II to Brief for Appellee attempts to support Union's lodging and filing of affidavits disclosing what occurred in the jury room by reference to the State of California Rule, C.C.P. §657(2). But this section refers to chance verdicts. The general rule in California is that affidavits (or declarations) of jurors may not be used to impeach verdicts even though they show coercion of a juror, evidence received out of court, discussion of the case with the bailiff, or independent investigation by some jurors. This is based on the policy of the desirability of stable verdicts and avoiding harassment of jurors. The only exceptions noted to this rule are chance verdicts and false answers on voir dire, concealing bias, or disqualification. Cont. Ed. of the Bar, Calif. Civ. Proc. During Trial Sec. 2021, at 500 (1960). The affidavits involved herein did not go to the issue of a chance verdict under

state law. They were clearly inadmissible in the federal courts. *Bryson v. United States,* 238 F.2d 657 (9th Cir. 1956); *Stein v. New York,* 346 U.S. 156, 178-179 (1953); see also *Armstrong v. United States,* 228 F.2d 764 (8th Cir. 1956); *United States v. Brown,* 99 F. Supp. 527 (D. Alaska 1951); *United States v. Handy,* 97 F. Supp. 930 (M.D. Pa. 1951), *rev'd on other grounds* 203 F.2d 407 (3rd Cir. 1953), *cert. denied sub nom. Maroney v. United States,* 346 U.S. 865 (1953); *United States v. Furlong,* 194 F.2d 1 (7th Cir. 1952); *Young v. United States,* 168 F.2d 242 (10th Cir. 1948); *United States v. 16000 Acres of Land,* 49 F. Supp. 645 (D. Kan. 1942); *United States v. Cherton,* 309 F.2d 197 (6th Cir. 1962); *Lay v. J. M. McDonald Co.,* 24 F.R.D. 36 (D. Colo. 1959); *United States v. Driscoll,* 276 F. Supp. 333 (S.D.N.Y. 1967); *Moore v. United States,* 1 F.2d 839, 841 (9th Cir. 1924), *cert. denied* 267 U.S. 593 (1925); *Spokane Int'l Ry. Co. v. United States,* 72 F.2d 440, 444 (9th Cir. 1934); *Department of Water & Power v. Anderson,* 95 F.2d 577, 586 (9th Cir.), *cert. denied* 305 U.S. 607 (1938); *United States v. El Rancho Adolphus Products,* 140 F. Supp. 645, 653 (M.D. Pa. 1956), citing *United States v. Nystrom,* 116 F. Supp. 771, 777 (W.D. Pa. 1953).

Bryson v. United States, supra, is not a retreat from *Mely,* but recognizes the distinction between affidavits disclosing outside or extraneous influences or tampering, and those which reveal the process of deliberation and arrival at a decision in the jury room. The latter are inadmissible in the Federal Courts. *Evalt v. United States,* 359 F.2d 534 (9th Cir. 1966) assumed the inadmissibility of the jury affidavits to impeach the verdict. There is no indication in *any* case cited by appellee that it is proper for attorneys to gather inadmissible evidence from jurors. It is against all authority to lodge and file juror affidavits hoping to prove that a verdict was arrived at by failure to follow jury instructions. Such was the purpose here and affidavits should have been stricken.

IV. CONCLUSION

It is respectfully submitted that a judgment upon the jury verdict should be entered as provided in Section 4 of the Clayton Act, 15 U.S.C. Sec. 15.

Dated, San Francisco, California,
July 3, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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